The plaintiffs' claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Cheng & Co.; Eugene Phoa & Co.*

HARBANS SINGH SIDHU v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J.) January 17, 1973]

[Singapore — Magistrate's Appeal No. 120 of 1972]

Penal Code, s. 500 — Defamation — Exceptions — Onus of proof that case falls under exceptions is on accused — Plea of justification — Good faith — Evidence Act (Cap. 5), s. 105.

Criminal Law and Procedure — Subpoena — Request for — Refusal by trial judge — Whether justifiable — Criminal Procedure Code (Cap. 113), s. 173(m).

This was an appeal against the conviction of the appellant for an offence of defamation under section 500 of the Penal Code. On appeal it was contended *inter alia* (1) that the learned trial judge had not directed his mind to the question whether the words alleged to be defamatory were true; (2) that the learned judge failed to direct his mind to the question whether or not the impugned words were spoken in good faith and (3) that the learned trial judge had exercised his discretion wrongly and acted contrary to section 173(m) of the Criminal Procedure Code in refusing the appellant's application to issue a *subpoena* to the Prime Minister of Singapore.

Held: (1) under section 105 of the Evidence Act if an accused claims the benefit of exceptions the burden of proving his plea that the case falls under any of the exceptions is on the accused. That burden is discharged if the accused person succeeds in proving a preponderence of probability. On the evidence on the plea of justification the appellant fell far short of discharging the onus on him;

(2) the finding of the learned trial judge that the impugned words were not spoken in good faith was amply supported by the evidence;

(3) on the evidence the application to *subpoena* the Prime Minister was vexatious and although the trial judge had not in his recorded reason for refusing the application complied with the exact terms of section 173(m) of the Criminal Procedure Code, that was no ground for vitiating the conviction, as there had been no failure or miscarriage of justice.

Case referred to:-

(1) *H. Singh* v. *State of Punjab* [1966] C.L.J. 82 at p. 88.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamad Kamil Suhaimi for the appellant.

S. Rajendran (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J.: In this appeal the appellant, Harbans Singh Sidhu, challenges the correctness of his conviction for an offence under section 500 of the Penal Code and the sentence imposed on him. The criminal proceedings against the appellant were started on a complaint filed by the Attorney-General who in his complaint alleged that the appellant defamed Mr. Lee Kuan Yew, the Prime Minister, by spoken words . The alleged defamatory words, as set out in the charge against the appellant are these: —

"Coming to the so-called Prime Minister of Singapore Lee Kuan Yew, what type of man is he? I can tell you he is one of the biggest scoundrels in the world, not only in Singapore.

What did this scoundrel Lee Kuan Yew say in the Assembly?

Today the same scoundrel Lee Kuan Yew is doing worse than Lim Yew Hock.

What kind of a man is this scoundrel Lee Kuan Yew?

Now we complain about this scoundrel Lee Kuan Yew to the International Commission of Jurists on behalf of the political detainees in Singapore.

They wrote a letter to this scoundrel Lee Kuan Yew on the 23rd of July 1971.

Dear gangster of Singapore.

I called him in the Nomination day there a gangster and a kidnapper.

I would write dear No. 1 gangster of Singapore. Dear No. 1 public enemy of Singapore. Dear kidnapper No. 1 in Singapore.

This scoundrel Lee Kuan Yew has not yet replied to this letter.

I want to respect this scoundrel/gangster.

But I will not write with respect to this scoundrel.

This letter has not yet been replied by the scoundrel Lee Kuan Yew."

Section 499 of the Penal Code defines defamation in the following terms: —

"Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

There can be no doubt at all and indeed it is not in dispute that the impugned words spoken by the appellant are *per se* defamatory and would harm the reputation of the Prime Minister. At the trial the appellant relied on the first, second, third, ninth and tenth Exceptions to section 499 of the Penal Code. It is therefore necessary to set out these Exceptions and they are in the following terms: —

"*First Exception.* — It is not defamation to impute anything which is true concerning any person, if it is for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception. — It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception. — It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Ninth Exception. — It is not defamation to make an imputation on the character of another, provided that the imputation is made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Tenth Exception. — It is not defamation to convey a caution, in good faith, to one person against another, provided that the caution is intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good."

After considering the evidence the trial judge came to the conclusion that the words spoken by the appellant were defamatory *per se* and held that the appellant had not brought himself within any of the Exceptions he relied on. In the result he convicted the appellant and sentenced him to six months' imprisonment.

Under section 105 of the Evidence Act, if an accused person claims the benefit of Exceptions, the

burden of proving his plea that his case falls under any of the Exceptions is on the accused. That burden is discharged if the accused person succeeds in proving a preponderance of probability.

Thus for the appellant at the trial to succeed on the First Exception, the onus was on him to prove that the impugned words spoken by him were true. The appellant's evidence in support of his plea of justification can be briefly summarised. He was the solicitor for some persons detained without trial under the Internal Security Act. After studying books on International Law and under the United Nations Declaration of Human Rights he came to the conclusion that the Internal Security Act was *ultra vires*, void and unlawful under International Law. Therefore all persons detained under the Internal Security Act have been unlawfully detained. Furthermore, these detained persons would not be released from detention unless they signed statements and by requiring the signing of a statement a condition of their release amounts to asking them for ransom. The wrongful detention for ransom of these detained persons amounts to the offence of kidnapping under the Kidnapping Act (Cap. 101). The Prime Minister as the head of the Government is the person responsible for the wrongful detention for ransom of these detained persons and therefore can be charged under the Kidnapping Act for kidnapping. The Prime Minister is therefore truly a kidnapper and because a kidnapper is automatically a scoundrel he is in truth a scoundrel. As regards calling him a gangster it is because it is a criminal act to kidnap and as gangsters do criminal acts he is in truth a gangster. He believed the truth of every word he said of the Prime Minister.

The appellant called one witness who said that when he was the secretary of a trade union he was arrested and detained in October 1966 and eventually released on 1st April 1970. He was released even though he did not "issue" a statement.

It was contended before me by counsel for the appellant that the trial judge did not direct his mind to the question whether or not the alleged words were true. Counsel gave no reasons in support of this contention and indeed there can be no reason as the trial judge in fact dealt with the defence of justification and dismissed it. It is clear from the above summary of the evidence on the plea of justification that the appellant fell far short of discharging the onus on him.

With regard to the other four Exceptions relied on by the appellant at the trial, each of these four Exceptions requires that the imputations were made in good faith. The expression "good faith" where it appears in the Penal Code is defined by section 52 which provides that "nothing is said to be done or believed in good faith which is done or believed without due care and attention". On the requirement of good faith section 500 also provides as follows: —

"*Explanation to Exceptions* — In proving the existence of circumstances as a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th or 10th exception good faith shall be presumed unless the contrary appears".

It is contended before me that with regard to the defence based on the 2nd, 3rd, 9th and 10th Exceptions the trial judge failed to direct his mind to the question whether or not the impugned words were spoken in good faith. In support of this contention, also, no arguments were presented or submissions made and indeed this contention is unsupported having regard to the judgment delivered by the trial judge at the close of the trial. In his judgment the trial judge said: —

"As regards the other exceptions relied on by the accused, whilst good faith is to be presumed, it requires care, caution and prudence in the background of context and circumstances. What I have said of the evidence clearly shows, to my mind, without a shadow of doubt that the accused is a senseless person motivated, I know not by what impulse, to make scurrilous and scandalous statements without any regard whatsoever."

The trial judge in that passage clearly had in mind the "Explanation to Exceptions" in section 500 and the definition of "good faith" in section 52 and found as a fact that the impugned words were not spoken in good faith. That is a finding of fact which is amply supported by the evidence. As Gajendragadkar C.J. who delivered the judgment of the Supreme Court of India in *H. Singh* v. *State of Punjab*[1] said at page 88: —

"Thus, it would be clear that in deciding whether an accused person acted in good faith under the Ninth Exception, it is not possible to lay down any rigid rule or test. It would be a question to be considered on the facts and circumstances of each case — what is the nature of the imputation made; under what circumstances did it come to be made; what is the status of the person who makes the imputation; was there any malice in his mind when he made the said imputation; did he make any enquiry before he made it; are there reasons to accept his story that he acted with due care and attention and was satisfied that the imputation was true? These and other considerations would be relevant in deciding the plea of good faith made by an accused person who claims the benefit of the Ninth Exception."

Another contention raised is that the trial judge erred in law in that he exercised his discretion wrongly and acted contrary to section 173(m) of the Criminal Procedure Code in refusing the appellant's application to issue a *subpoena* to Mr. Lee Kuan Yew, the Prime Minister of Singapore. The request for a *subpoena* addressed to the Prime Minister was to produce documents relating to all persons who are detained under the Internal Security Act (Cap. 115) and under the Criminal Law (Temporary Provisions) Act (Cap. 112). It was an omnibus request for the production of *all* documents relating to *all* persons so detained. The reason given to the trial judge by Mr. Kamil, counsel for the appellant at the trial was that all the documents are relevant because the defence has to prove that there are detainees. The trial judge refused the application and made a note that it was refused "for the reasons requested for by Mr. Kamil". It is to be observed that it is conceded by the prosecution that there were persons detained under the Internal Security Act and the Criminal Law (Temporary Provisions) Act.

While the trial judge had not, as indicated in his recorded reason for refusing the application, complied with the exact terms of section 173(m) of the Criminal Procedure Code, in my judgment that is no ground on the facts and circumstances of the application, for vitiating the conviction of the appellant as in my view there has been no failure or miscarriage of justice. It seems to me, it being admitted that there were persons

detained under the aforesaid two Acts, that the application for a *subpoena* addressed to the Prime Minister to produce all documents relating to all such detainees was clearly vexatious. The fact that it was sought to *subpoena* the Prime Minister when he was not in law the Minister charged with the responsibility of administering these two Acts seems to me clear evidence that the application was vexatious.

Several other grounds were raised in the petition of appeal but at the hearing of the appeal no arguments were presented by counsel for the appellant in support and in my judgment there is no substance in any of them.

Lastly, it is contended that the sentence was manifestly excessive and reliance is placed upon the fact that some consideration ought to have been given because the defamatory words were spoken during an election campaign speech. It is to be observed that at the trial the defence was one of justification and the appellant in his sworn testimony continued to assert the truth of the imputations he had made. In my judgment, the trial judge was justified in imposing a sentence of six months and for all these reasons the appeal against conviction and sentence is dismissed.

Appeal dismissed.

Solicitors: *Harbans Singh & Kamil.*

MALAYSIAN REPORTS

YEO KIAN ANN & SON v. RAILWAY ADMINISTRATION

[O.C.J. (Mohamed Azmi J.) May 24, 1972]

[Kuala Lumpur — Civil Suit No. 1892 of 1968]

Railway Administration — Requirement of notice by plaintiff or his solicitor before commencement of action — Strict interpretation — Common law liability of railway administration — Railway Ordinance, 1948, ss. 37 & 77(2).

Tort — Negligence — Railway train — Private level crossing — Common law liability.

In this case the plaintiffs claimed damages against the Railway Administration for loss sustained as a result of a collision between their motor-lorry and a train at a private level crossing. The Railway Administration raised two preliminary objections to the claim (1) that no notice of the claim had been given by the plaintiff or his solicitors as required by section 77(2) of the Railway Ordinance, 1948; (2) that as section 37 of the Railway Ordinance did not impose any liability on the Railway Administration as far as private level crossings were concerned, the Railway Administration was also not obliged to do anything at common law. It appeared that in this case a written notice was served by the solicitors for the insurance company, who were the insurers of the lorry belonging to the plaintiffs.

Held: (1) the written notice in this case was not served by the plaintiffs or their solicitors and therefore did not constitute a proper notice as required by section 77(2) of the Railway Ordinance, 1948;

(2) although section 37 of the Railway Ordinance is silent as regards the obligation of the Railway Administration towards members of the public, this did not relieve them for their common law obligation to take care.

Cases referred to:-

(1) *Thakur Das* v. *E.I. Ry. Co.* A.I.R. 1926 All 686.

(2) *Dominion of India* v. *Hazari Lal and another* A.I.R. 1949 Pat. 410.

(3) *Union of India* v. *Kalinga Textiles Private Ltd. Co. and another* A.I.R. 1969 Bom. 401.

(4) *Lickiss* v. *Milestone Motor Policies* [1966] 2 All E.R. 972.

CIVIL SUIT.

C. T. Chan for the plaintiffs.

Morris Edgar (*P. Rajasingham* with him) for the defendants.

Mohamed Azmi J.: The plaintiffs who are a firm of contractors and general merchants at Klang claimed damages against the Railway Administration for loss sustained as a result of a collision between their motor lorry BR 1942 and a train on June 10, 1968 at about 10.45 a.m. at a private level crossing at Sungei Rengam Estate. In the pleading it was alleged by the plaintiffs that the collision which had caused severe damage to their motor lorry was due entirely or was substantially contributed to by the negligence of the Railway Administration, their servants or their agents. Alternatively, they alleged that the said collision was caused by the breach of statutory duty of the defendants, their servants or agents. The private level crossing was constructed under the provisions of section 37 of the Railway Ordinance, 1948 at the request of the Sungei Rengam Estate, Highlands Malaya Plantations Ltd. for the purpose of giving access to the estate.

In paragraph 6 of their further amended statement of defence, the Railway Administration contend-